IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 70,918

DANIEL F. JAGGERS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and will be referred to as respondent in this brief. A one volume record on appeal, one volume transcript, and two volume supplemental record are all sequentially numbered at the bottom of each page, and will be referred to as "R" followed by the appropriate page number in parentheses. All proceedings below were before Circuit Judge N. Russell Bower. This case was previously before the First District Court of Appeal, which is reported as Jaggers v. State, 492 So.2d 418 (Fla. 1986). Attached hereto is the opinion of the First District Court of Appeal under review. Petitioner's brief will be referred to as "PB", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation (PB at 2-4).

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that his 15 year sentence, which was a departure from the recommended range of 12-30 months, was properly vacated below because it was not supported by clear and convincing reasons. The judge could not use the prior court records from Missouri to support his reasons for departure because respondent had not been convicted of any crime in Missouri. The guidelines rule specifically prohibits the use of facts derived from prior arrests which did not result in convictions.

The judge also erred in finding as a reason for departure that the victim suffered from emotional trauma and the state has conceded the point.

The judge also erred in relying upon his opinion that the guidelines range was insufficient. This shows a mere disagreement with the guideline scheme, and cannot be a valid reason for departure, as this Court has recently held.

Because all of the reasons for departure are invalid, the lower tribunal properly ordered that respondent be resentenced within the recommended guidelines range.

IV ARGUMENT

A COMMITMENT TO A MENTAL INSTITUTION FOR OTHER THAN A CRIMINAL CONVICTION AND THE SUBSEQUENT CONDITIONAL RELEASE OR SUPERVISION STATUS THAT EXISTED AT THE TIME OF THE CRIME ARE NOT VALID REASONS FOR DEPARTURE FROM THE GUIDELINES.

On resentencing, after respondent's first appeal, the parties agreed that respondent could not be assessed 80 points for a prior second degree felony conviction for child molesting in Missouri, and also could not be assessed 30 points for being on legal restraint by virtue of his "probationary" status after his release from the hospital commitment in Missouri. However, even though the parties agreed not to score these matters, the court turned around and used them as reasons for departure #1 and #2. This is illegal, because respondent is being penalized for conduct which is not criminal.

The judge's reasons for departure are set forth at R-11-12 and will not be repeated here. Reasons #1 and #2 relate to the prior arrest in Missouri, the civil commitment, and subsequent release. Since the advent of the guidelines, Florida Rule of Criminal Procedure 3.701(d)(11) always has prohibited the use of prior arrest without convictions as reasons for departure:

> Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction.

Cases are uniform in condemning such use in any form by the judge. See, e.g., Weems v. State, 469 So.2d 128 (Fla. 1985); Sellers v. State, 499 So.2d 43 (Fla. 1st DCA 1986); Aleman v.

State, 498 So.2d 967 (Fla. 2d DCA 1986); Hendsbee v. State, 497 so.2d 718 (Fla. 2d DCA 1986); Henderson v. State, 496 So.2d 965 (Fla. 1st DCA 1986); Bass v. State, 496 So.2d 880 (Fla. 2d DCA 1986); and Dowling v. State, 495 So.2d 874 (Fla. 5th DCA 1986).

Respondent was indicted for this offense in Missouri on December 15, 1976 (R-184-185). The minutes of proceedings show that he was ordered confined in a mental hospital on February 2, 1977, for a determination of competency to stand trial (R-177). The case was removed from the trial docket. On March 9, 1977, respondent was found competent to stand trial (R-177). On June 22, 1977, a petition to declare respondent a criminal sexual psychopath was filed by the prosecutor, and on July 21, 1977, respondent's counsel requested that he be committed (R-175).

On July 27, 1977, respondent was ordered committed "pursuant to Section 202.700 et seq. R.S. Mo." (R-174). On September 20, 1977, a medical report was received and filed. On October 6, 1977, another petition to declare respondent to be a criminal sexual psychopath was filed (R-173). On November 10, 1977, the court found respondent to be a criminal sexual psychopath and committed him to a hospital (R-170).

On March 11, 1980, respondent was released from the Missouri State Hospital, and placed on three years probation, and allowed to reside in Panama City Beach with his wife until his return to court on May 12, 1980 (R-167-68). On September 8, 1980, respondent was continued on probation, and supervision was transferred to Florida (R-164-65).

The purpose of this historical account is to demonstrate that respondent was never convicted of any crime in Missouri. Rather, he was treated as a criminal sexual psychopath pursuant to Section 202.700 et seq. R.S. Mo. These statutes are contained in the supplemental record at R-77-78. They provide for commitment to a state hospital prior to the criminal trial, and for a three year probationary period upon release from the hospital. Section 202.730 and 202.740 R.S. Mo. (R-78). They also allow criminal prosecution after release. Section 202.750 R.S. Mo. (R-78).

These Missouri statutes have been construed to allow the prosecutor to seek civil commitment as an alternative to criminal prosecution, within the prosecutor's total discretion. State v. McDaniels, 307 S.W. 2d 42 (Mo.App. 1957); Davis v. State, 482 S.W.2d 468 (Mo. 1972); State v. Wheat, 573 S.W.2d 126 (Mo.App. 1978); State v. Csolak, 573 S.W.2d 118 (Mo.App. 1978); and Lyle v. State, 617 S.W.2d 403 (Mo.App. 1981). These proceedings are civil in character, being curative and remedial, and not criminal. State v. McDaniels, supra; State ex rel. Wright v. MacDonald, 330 S.W.2d 175 (Mo.App. 1960); Bynum v. State, 545 S.W.2d 720 (Mo.App. 1977); and State v. Wheat, supra.

In Allen v. Illinois, 478 U.S. __, 92 L.Ed.2d 296 (1986), the Supreme Court found a similar Illinois statutory scheme (Ill.Rev.Stat. Ch. 38, 105-1-01 et seq.) to be wholly non-criminal in nature:

The Illinois Supreme Court reviewed the

> Act and its own case law and concluded that these proceedings, while similar to criminal proceedings in that they are accompanied by strict procedural safeguards, are essentially civil in nature. 107 Ill 2d, at 100-102, 481 NE2d, at 694-695. We are unpersuaded by petitioner's efforts to challenge this conclusion. Under the Act, the State has a statutory obligation to provide "care and treatment for [persons adjudged sexually dangerous] designated to effect recovery," 105-8, in a facility set aside to provide psychiatric care, ibid. And "[i]f the patient is found to be no longer dangerous, the court shall order that he be discharged." 105-9. While the committed person has the burden of showing that he is no longer dangerous, he may apply for release at any time. Ibid. In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of "the traditional aims of punishment--retribution and deterrence." Kennedy v. Mendoza-Martinez, 372 US 144, 168, 9 L Ed 2d 644, 83 S Ct 554 (1963).

92 L.Ed.2d at 304-305 (footnotes omitted). Thus, because the judge relied upon a prior arrest without a conviction and the non-criminal commitment proceedings in reasons #1 and #2, they were properly stricken. Reason #2 also contains a conclusion that petitioner is dangerous and cannot be rehabilitated. Such a finding is not a clear and convincing reason for departure. Jones v. State, 501 So.2d 665 (Fla. 1st DCA 1987); Gaynor v. State, 505 So.2d 467 (Fla. 2d DCA 1987); and Scobee v. State, 488 So.2d 595 (Fla. 1st DCA 1986).

Respondent's alleged "dangerousness" is not the same as that displayed by the defendant in Williams v. State, 504 So.2d 392 (Fla. 1987). Mr. Williams had a terrible history of criminal activity:

> 1. The Defendant as a juvenile was committed to the Department of HRS for the offense of Arson dated January 11, 1977. He was committed also in Case No. 76-466 for Arson and Burglary of an Occupied Dwelling, and again committed for Shoplifting dated August 18, 1978. At age eighteen (18) years, the Defendant was sentenced to Department of Corrections for three (3) years for Burglary of a Structure dated February 19, 1979 and paroled September 16, 1980. He was charged with violation of his parole on March 3, 1981, having only been out of prison for some six months. On July 10, 1981 the Defendant was again sentenced to the Department of Corrections on the offense of Attempted Burglary for five (5) years. On December 10, 1983 he was discharged as to that sentence and after only approximately ten (10) months committed the instant offense on October 6, 1984.
>
> 2. The continuing criminal behavior since the Defendant's age of sixteen years demonstrates his total disregard for the rehabilitative efforts of the past dispositions for his criminal behavior. There is no hope for rehabilitation of this individual.
>
> 3. The Defendant served approximately fourteen (14) months on his first three (3) year Department of Corrections sentence and some twenty-nine (29) months on the five (5) year Department of Corrections sentence. Under sentencing guidelines for standing convicted of Burglary of a Dwelling with Intent to Commit an Assault and Aggravated Battery, this Defendant would receive a recommended sentence of four and one-half (4 1/2) to five and one-half years (5 1/2) which with gain time might allow him to serve less time

> on these serious violations than he served on his last period of incarceration. This should not be the intent of a sentence and the punishment for his criminal conduct in the present cases should be substantially greater to protect society and deter him in future criminal activities.
>
> 4. To impose the suggested sentence under sentencing guidelines would make a mockery of this court's sentencing goal.
>
> 5. The frequency of the Defendant's criminal conduct and especially in view of the short duration from his previous periods of incarceration with the Department of Corrections demonstrates a need for punishment greater than that provided by Rule 3.701, Fla.R.Crim.P.

Id. at 392-93. Compare Mr. Williams' criminal record with respondent's lone prior misdemeanor conviction (R-9).

This Court in Williams held that the above reasons for departure were proper. Please note that Mr. Williams had been convicted of every offense mentioned above. His "continuing and persistent pattern of criminal activity", Id. at 393 (emphasis added) justified the departure.

Here, respondent has no such pattern of criminal activity. His prior arrests in Missouri did not result in any conviction. Thus, it would be a clear violation of the rule to allow departure for non-criminal conduct.

Nor can the state infer a propensity for criminal dangerousness from the record within the meaning of Williams. Respondent suffers from a recognized medical and psychiatric condition, organic personality syndrome, which he obtained in the service of his country in the jungles of Vietnam. DSM III

at 118-20. This condition, being organic, is treatable but not curable.

Our society has progressed beyond locking up mentally ill people in prisons, where they will be exposed to nasty criminals, and where they will receive no treatment. The lower tribunal, correctly holding that respondent's non-criminal medical history could not be used against him to increase his sentence, struggled to find an alternative. Although not suggested by either party below, the First District seized upon civil commitment under the Baker Act, Chapter 394, Florida Statutes, as a perfect solution to respondent's problem. Under a Baker Act commitment, respondent will be able to receive the treatment he requires; under a prison commitment, he will not.

Reason #3 relates to emotional trauma allegedly suffered by the victim. The District Court properly struck it, and petitioner concedes the point (PB at 14).

Reason #4 expresses the judge's disagreement with the guidelines scheme, and cannot, by itself, function as a valid reason for departure, as this Court recently held. Scott v. State, 508 So.2d 335 (Fla. 1987).

Thus, petitioner has failed to demonstrate that the lower tribunal's well-reasoned disposition of this case was erroneous. This Court must approve it in all respects.

V CONCLUSION

Based upon the foregoing, respondent requests that this Court affirm the decision of the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Gregory C. Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, Mr. Daniel F. Jaggers, #910232, Post Office Box 518, Zephyrhills, Florida, 34283, this 25 day of August, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER